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MAR 18 1961
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

Nos. 760, 761.

WISCONSIN EMPLOYMENT RELATIONS BOARD,
Petitioner,

v.

LODGE 78 of the INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO,
Respondent.

On Petitions for Writ of Certiorari to the Supreme Court of Wisconsin.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Wisconsin Supreme Court is printed in 11 Wis. 2d 292, 105 N. W. 2d 278. Since this case was argued as a companion case, the principal opinion of Wisconsin Supreme Court is reported in 11 Wis. 2d 277, 105 N. W. 2d 271.

Opinions of the circuit court of Milwaukee County covering this and companion case are reported at 46 L. R. R. M. 2628. The orders and accompanying memoranda opinions of the Wisconsin Employment Relations Board are unreported.

All of the above opinions have been reproduced in the separate appendix of the Petitioner W. E. R. B., and all references to state court opinions will be in reference to where the opinions appear in such appendix.

The original findings and order of the W. E. R. B. are not contained in the appendix of the W. E. R. B. and are unreported. These findings and order are printed in the record filed herein at pages 150-153, and are therefore not reproduced.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the Petitions.

QUESTION PRESENTED.

Does a state board or court have jurisdiction to prohibit activity of a union representing employees of an interstate employer in view of the fact that legality of such activity must be determined by application of the National Labor Relations Act, as amended?

STATUTES INVOLVED.

The pertinent provisions of the National Labor Relations Act, as amended, and the Wisconsin Employment Peace Act are adequately set forth in the Petitions.

STATEMENT.

Lodge 78, I. A. M. is the certified bargaining agent for employees employed in the tool room of the Allen-Bradley Company (R. 179). This company is one whose business affects interstate commerce within the meaning of the Labor Management Relations Act of 1947, as amended (R. 181).

On September 1, 1956 a strike was called among these employees (R. 179). During the course of this strike fourteen employees, also union members, crossed the picket line and went to work (R. 179). Subsequent to termination of the strike, these members were tried for conduct unbecoming members according to the constitution of the union and fined $100.00 (R. 180).

All of these employees were voluntary members of the union whose membership was terminated for failure to pay periodic dues (R. 181). At no time has the union attempted to interfere with the job rights of these employees (R. 181).

In December, 1956, each of these fourteen employees received demand from counsel for the union for payment of the fines (R. 180). On January 24, 1957, the union commenced fourteen separate actions in the Civil Court of Milwaukee County to collect these fines. These actions are still pending (R. 180).

All fourteen of these employees filed unfair labor practice charges with the National Labor Relations Board (R. 181). The General Counsel of the National Board refused to issue complaints on October 28, 1957 (Opinion F-198) (R. 180). Twelve of the fourteen employees then filed identical unfair labor practice complaints with the Wisconsin board, claiming the union, in fining its members, committed unfair labor practices under Wisconsin law (R. 142-144). The union claimed in its answer that its activity was either prohibited or protected under the fed-

eral Act, and that the state board therefore had no jurisdiction (R. 146, 147).

On November 21, 1958, after hearing by the state board, said board by unanimous decision dismissed the twelve complaints on the grounds that the federal Act preempted the union activity and that the state board had no jurisdiction (R. 150-153). After motion for rehearing, the state board amended its findings and order, and, by two to one decision, found the union guilty of committing a state unfair labor practice (R. 154-158).

The union appealed from this order, predicating its appeal, *inter alia*, that the state board had no jurisdiction over the subject matter in that same was preempted and specifically protected by the federal Act (R. 178).

This appeal was determined by the Circuit Court of Milwaukee County, which found no preemption or conflict and sustained the jurisdiction and order of the state board (W. E. R. B. App. pp. 30-46). The union appealed this judgment, and the Wisconsin Supreme Court unanimously reversed the circuit court and state board and held there was preemption, and that the state board had no jurisdiction (W. E. R. B. App. pp. 1-20). At the time of argument before the Wisconsin Supreme Court, all parties agreed that the union committed no violation of the federal Act because otherwise there would clearly be preemption (W. E. R. B. App. p. 7).

Concomitant with the filing of complaints with the state board by twelve employees, the remaining two employees commenced an action in federal District Court in Washington, D. C. to compel the General Counsel of the National Board to issue complaints (R. 181). Both the District Court and Circuit Court of Appeals refused to compel the General Counsel to issue complaints under the federal Act.*

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* *Bandlow et al. v. Fenton* (1959), 38 Labor Cases, par. 65,779 (U. S. D. C. Dist. of Col.); *Bandlow et al. v. Rothman et al.* (1960), 278 F. (2d) 866 (C. A. Dist. of Col.).

ARGUMENT.

The issue in the case at bar is uniquely narrow and restricted. Neither scatter-gun technique nor strained semantics can convert it into one warranting review by this Court on certiorari. The state court defined the federal question as "whether Congress by insertion of such proviso [referring to 8 (b) (1) (A)] intended to make such an activity a protected one, or whether it intended that such union conduct should remain outside of the scope of Congressional regulation so that the states might regulate if they so desire" (W. E. R. B. App. p. 7).

At the state court level, Petitioners agreed that the union activity complained of was embraced within the scope of the proviso (W. E. R. B. App. p. 7). Had there been no such agreement, then there clearly would be preemption because the union conduct would be prohibited under the federal Act as well as under state law. **Garner v. Teamsters** (1953), 346 U. S. 485.

Despite this agreement, Petitioners now contend that the union activity here involved is prohibited by the federal Act, and that this Court should therefore grant certiorari. Since the state court did not rule on this issue, it is not properly before this Court for review on certiorari or otherwise.

It must be further noted that the individual Petitioners filed charges with the National Labor Relations Board (hereinafter referred to as "N. L. R. B.") before proceeding to the state labor board and state courts. On October 28, 1957 (Opinion F-198), the General Counsel of the N. L. R. B. dismissed the charges on the ground that the conduct of the union was excluded from the definition of unfair practices under federal law by the proviso to sec. 8 (b) (1) (A). It appears conclusively that after such determination by the General Counsel the individual Petitioners relied solely on state law for vindication of their

claims. Where the state court predicated its determination on agreement by Petitioners that the federal Act did not prohibit the union conduct, Petitioners cannot now seek to reverse the dismissal by the General Counsel of the N. L. R. B. by seeking a review of the state court decision.

The Petitioner, Wisconsin Employment Relations Board (hereinafter referred to as "W. E. R. B."), has also attempted to inject another issue not determined by the state court. On pages 8 and 9 of its Petition, Petitioner W. E. R. B. asserts that the decision of the state court conflicts with the Labor Management Reporting and Disclosure Act of 1959. The state court's decision was limited to rights protected under the National Labor Relations Act, as amended. Section 603 (b) of the Reporting and Disclosure Act of 1959, provides:

> ". . . nor shall any thing contained in said titles (except section 505) of this Act be construed to confer any rights, privileges, immunities, or defenses upon employers, or to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended."

Inasmuch as the state court's decision was predicated solely on rights protected under the National Labor Relations Act, other issues are not properly before this Court for review. The very Act relied upon by Petitioner demonstrates that this is manifestly correct.

I.

The Decision Below Is Clearly Correct.

1. The state court complied meticulously with the jurisdictional guide posts established by this Court in **San Diego Building Trades Council v. Garmon** (1959), 359 U. S. 236. In applying the test of preemption the state

court found that the union activity complained of was "arguably within the compass of sec. 7 or sec. 8" of the federal Act. This finding was predicated upon four cases: **Sanders v. International Ass'n. of Iron Workers** (1956), 235 Fed. (2d) 271 (C. A. 6); **Allen Bradley Company** (1960), 127 N. L. R. B. No. 8; **Minneapolis Star and Tribune Co.** (1954), 109 N. L. R. B. 727; and **Internat'l. Typographical Union** (1949), 86 N. L. R. B. 951.

These cases clearly demonstrate that the N. L. R. B. interprets the proviso as having the effect of making the enforcement by a union of its own constitution and by-laws a protected activity under the federal Act. The state court reviewed these cases (W. E. R. B. App., pp. 13[illegible] and further determined that such interpretation was "permissible", especially since Congress used the word "right" when referring to the union activity of prescribing rules for acquisition and retention of membership.

Petitioners now contend that this Court should interpret the proviso to give the states jurisdiction. Such request is clearly contrary to **Garmon.** Assuming that the decisions relied upon by the state court do not determine with "unclouded legal significance" that the activity here is protected, this still does not leave state labor boards or courts jurisdiction to determine the status of the activity. This Court in **Garmon,** 359 U. S. at 246, stated:

> ". . . It follows that the failure of the Board to define the legal significance under the Act of a particular activity does not give the States the power to act. In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction. The withdrawal of this narrow area from possible state activity follows our decisions in

Weber and **Guss**. The governing consideration is that to allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy."

There are no National Board cases cited by Petitioners that purport to define the activity of the union as not protected under the proviso to 8 (b) (1) (A) of the federal Act. Alternatively, the disputed activity is "arguably" protected or there has been no determination by the N. L. R. B. which precisely defines the legal significance of such activity. The states can have no jurisdiction to determine in which area the disputed activity falls.

Petitioners cite numerous decisions of this Court and the eminent Professor Archibald Cox that state courts and this Court on review decided whether particular activities were within the purview of Sections 7 or 8 of the federal Act. This approach is "no longer of general application" since questions of interpretation of the federal Act are committed in the first instance to the administrative processes of the National Board. **Garmon**, 359 U. S. at 245, n. 4. Obviously the cases relied on by Petitioners (and the statement of Professor Cox) antedate the preemption approach adopted by this Court. Petitioners still assert that this Court should "compound the defects of a now discarded approach to preemption." **N. L. R. B. v. Insurance Agents** (1960), 361 U. S. 477.

2. The state court correctly applied **Machinists v. Gonzales** (1958), 356 U. S. 617, in conjunction with **Garmon** in deciding that the state labor board had no jurisdiction. The state board, in an unfair labor practice proceeding,[1]

[1] In the case at bar individual Petitioners filed unfair labor practice charges before the W. E. R. B. not for assessment of damages nor enforcement of private contractual rights created by the union constitution, but in reliance upon exercise of power by the state board in enforcing state labor policy. This Court acknowledged this basic distinction in *Gonzales*, 356 U. S. at 622, footnote.

attempted to "regulate the vital economic instruments of the strike and picket line and impinge on the clash of still unsettled claims between employers and labor unions." **Garmon**, 359 U.S. at 241.

In rendering its decision, the state court correctly found that the activity which the state board attempted to regulate was not "merely peripheral" but regulated the very heart and guts of activities regulated by Sections 7 and 8 of the federal Act (W. E. R. B. App. pp. 10-12). The right of the union to impose a fine upon a member for going through a picket line certainly affects in ultimate result the success of the conflict between the union and company in collective bargaining as well as it affects the exercise of rights to engage in concerted activities protected by Section 7 of the federal Act. The petitioning state board candidly admits that the state regulation here was specifically designed for the very purpose of affecting the balance of bargaining power (W. E. R. B. Petition, p. 10). Such attempt by the state "involves too great a danger of conflict with national labor policy." **Garmon**, 359 U. S. at 246.

Grave concern is expressed by Petitioner that because the subject matter in the case at bar is preempted, all jurisdiction is lost by the state in proceedings pertaining to a union's constitution and by-laws. The decision of the state court clearly states otherwise.

The state court's decision unequivocally recognizes that in those areas of "merely peripheral concern" to the federal labor Act, the states still have jurisdiction (W. E. R. B. App. pp. 9-10). This historical application of common law by the state, and acknowledged by this Court in **Gonzales**, will still be applied by the state in those "peripheral" areas where the contractual rights arising out of the union constitution "are too remotely related to the public interest sought to be protected by the Labor Management Rela-

tions Act to require a holding that there exists preemption under such Act" (W. E. R. B. App. p. 10). The Wisconsin court has been rarely reticent in utilizing the full measure of allowable state jurisdiction in the labor matters. Based on the state court's clear assertion in the case at bar, Petitioners' fears are patently groundless.

II.

There Is No Conflict of Decision.

Conflict of decision within a particular state is resolved by the state supreme court. In the case at bar the Wisconsin court has determined with clarity and certainty that the W. E. R. B. and Wisconsin courts may function in the "peripheral" areas; and the state court, in conformity with **Garmon** and **Gonzales**, has delimited state board and court jurisdiction where state control "involves too great a danger of conflict with national labor policy." **Garmon**, 359 U. S. at 246.

The Petitioners have cited no contrary decision in any other state in conflict with the Wisconsin court's preemption determination. On the contrary, since **Garmon** other states have complied with this Court's new approach. See **Dooly v. Anton** (1960), 8 N. Y. 2d 91, 168 N. E. (2d) 256. There is no need for this Court to resolve a conflict that does not exist.

III.

There Is No Important Question of Federal Law.

This Court in **Garmon**, 359 U. S. at 246, recognized that it was withdrawing a "narrow area" from possible state control where the National Board had not determined with "unclouded legal significance" that a particular activity is within or without federal regulation. Since the activity

here falls within this "narrow area", there is no impelling consideration shown by Petitioners that ultimate resolution of this activity should not be made by the exclusive primary agency entrusted with administration of the federal Act—the National Labor Relations Board.

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

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